MISSISSIPPI LAW JOURNAL

Special Issue

REVISED RULES OF THE SUPREME COURT OF MISSISSIPPI ANNOTATED

SOME SUGGESTIONS AS TO ORAL ARGUMENTS AND WRITTEN BRIEFS IN THE SUPREME COURT OF MISSISSIPPI

W. G. Roberds

August, 1958

VOLUME XXIX NUMBER 4

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VOLUME XXIX AUGUST, 1958 NUMBER 4

CONTENTS

FOREWORD ..... *W. N. Ethridge, Jr.* 371

REVISED RULES OF THE SUPREME COURT OF MISSISSIPPI, ANNOTATED 372

FOREWORD ..... *Harvey McGehee* 401

SOME SUGGESTIONS AS TO ORAL ARGUMENTS AND WRITTEN BRIEFS IN THE SUPREME COURT OF MISSISSIPPI ..... *W. G. Roberds* 403

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Mississippi Law Journal

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FOREWORD

This Special Issue, prepared by the *Mississippi Law Journal,* contains the first annotations of the 1952 Rules of the Supreme Court of Mississippi, as revised through July, 1958. These rules have previously been published in unannotated form by the Honorable Tom Q. Ellis, Clerk of the Court.

The Supreme Court of Mississippi has exercised, since the earliest days of that tribunal, an extensive rule-making power for practice and procedure before it. It now exercises this power under Article 6 of the Mississippi Constitution of 1890, and Mississippi Code of 1942, Sections 1664 and 1961. The rules which were in effect in 1949 were annotated and published by the 1949 Mississippi Law Institute, but this pamphlet is out of print and unavailable. Moreover, the current rules represent considerable revision. In the past few years there have been a large number of cases interpreting and applying the various rules. This annotated edition makes available a comprehensive and up-to-date set of the Supreme Court's rules with annotations. In my opinion it will be of considerable help and interest to the bench and bar of the state. And of primary importance, it should facilitate the expeditious and efficient administration of the Court's functions.

W. N. Ethridge, Jr.
Associate Justice
Supreme Court of Mississippi
Oxford, Mississippi
July 18, 1958

REVISED RULES OF THE SUPREME COURT OF MISSISSIPPI *

Adopted December 1, 1952

As Amended Through July, 1958

Ordered that the following rules be adopted for the government of this Court, superseding all others heretofore in force and not hereby readopted.

RULE 1. TRANSCRIPT — HOW PREPARED. (1) Every transcript of record brought to this Court shall be distinctly and plainly printed, or typewritten; and, if typewritten, on paper not less than eight, nor more than eight and one-half inches wide and fourteen inches long, on one side of every leaf; and each page shall be numbered at the bottom, at or near the center, and there shall be a blank margin at both top and bottom of not less than one inch, a blank margin at the right side of not less than one-half inch, and a blank margin at the left side of not less than one and one-half inches. Transcripts may be typewritten on linen paper, to weigh not less than eight pounds to one thousand sheets, and must be double spaced. Only black record typewriter ribbons shall be used in making up transcripts and these must not be worn or dim. Pica type or larger should be used. All photographs, maps, and other exhibits capable of being bound in the record shall be inserted in the record at the place where first identified or introduced. The record shall not contain any brief, letter, or memorandum on legal or factual arguments made before any lower court, board, commission, or agency. When the appeal involves a case originating before any board, commission, or agency, any memorandum, letter, notice, or other document included in the record which is on paper smaller than the pages of the record shall be fastened to a blank sheet of paper of the same size required of the record and properly numbered and indexed; and all parts of the record which may be sent up from such board, commission, or agency shall be numbered and indexed as in other cases.[1]

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*Mr. *Kenneth Giles Perry*, senior law student, compiled and edited the complete annotations to the Revised Rules of the Supreme Court contained herein.

(2) No carbon or other duplicates, nor transcripts typewritten with copying ink will be received. Each record shall be prefaced by a suitable index, and each typewritten transcript shall be securely bound in nonflexible pasteboard covers, with marbled sides, in volumes of about an equal number of pages, not to exceed in any case two hundred and fifty pages in a volume, for the payment of which binding appellant will be allowed seventy-five cents per volume to be taxed with the costs. The appellant may cause the transcript to be bound as above described, or he may, at the time of taking his appeal deposit with the clerk of the court from which the appeal is taken, a binding fee of seventy-five cents per volume of two hundred and fifty pages. Counsel shall not put any markings on the original record.

(3) In such cases the clerk shall transmit the unbound transcript, with the binding fee, to the Clerk of this Court. Transcripts shall not be folded, but may be rolled for transmission, if not bound as required; and if not bound, the sheets shall not be fastened together.

(4) The Clerk of this Court shall not accept any record made up in violation of these rules, and for the making and filing of such a record no clerk shall be allowed any fees whatever.

(5) The Clerk of this Court shall refuse to receive a record wherein the court reporter's transcript is not indexed as required by Section 721, Code of 1930, (Section 1636, Code 1942). When a transcript not so indexed is tendered, the Clerk shall return the same to the clerk of the court below; and at the same time the Clerk of this Court will notify the attorneys for the appellant, by letter or letters, of his action and the reason therefor.

JUDICIAL DECISIONS

Davis v. Rosenthal Plywood Sales Co., 207 Miss. 574, 42 So. 2d 750 (1949). Use of loose-leaf binders is not a compliance with Supreme Court rule requiring transcript of record to be bound in "non-flexible pasteboard covers, with marbled sides."

Howell v. State, 103 Miss. 520, 60 So. 135 (1912). Where the record is not double spaced, the case will be remanded to the docket for a writ of certiorari to the clerk of the lower court to send up a proper transcript.

RULE 2. TRANSCRIPT — WHAT TO CONTAIN. A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from,

[1]The portion encompassed in the last three sentences of Rule 1 (1) as to exhibits and extrinsic documents, was promulgated by the Court on October 24, 1956.

unless the appellant shall, by writing, request other matters specified to be embraced in the transcript, a copy of which shall be annexed to the transcript; and exhibits to declarations, bills, answers, depositions, etc., shall immediately follow the particular plea or deposition, first referring to them, and shall be copied but once. The several answers of witnesses as made in depositions shall each follow consecutively the particular interrogatory to which they are responsive; and no commission to examine a witness, nor certificate of a commissioner to a deposition, nor any proceedings to obtain such a commission, shall be inserted in any transcript except where a question as to the sufficiency or legality thereof appears from the record to have been decided; and no fee shall be allowed for anything besides these matters required to be embraced in the transcript.

JUDICIAL DECISIONS

Conn v. State of Mississippi, 97 So. 2d 923 (Miss. 1957). Under Rule 2 no witness subpoenas shall be copied into the record.

Kline v. Sims, 113 So. 190 (Miss. 1927). An alleged special bill of exceptions, not signed by the chancellor, and therefore not a bill of exceptions, does not belong in the record.

Under Rule 14 adopted and promulgated by the judges and chancellors under authority of Laws 1920, c. 125, Section 2, filing of chancellor's opinion as a part of the record in the cause for purposes of appeal is proper, notwithstanding Supreme Court Rule 2, prescribing what the record on appeal shall contain.

Martin v. Broadhead, 202 Miss. 281, 32 So. 2d 133 (1937). Under Supreme Court Rule 2, the assignment of error in the Circuit Court is part of the record of the trial in that court from the County Court, but the briefs thereon filed in Circuit Court are not properly part of the record to be transmitted to the Supreme Court on appeal.

Masonite Corp. v. Guy, 223 Miss. 8, 78 So. 2d 579 (1955). On motion to retax costs, the clerk's fees for copying into the record motions and orders for subpoenas duces tecum, subpoenas for witnesses, jury lists, and bill from cafe for meals for jury would be disallowed, since such items should not have been copied in the record under Rule 2.

Mississippi Cent. R. v. Chambers, 103 Miss. 400, 60 So. 562 (1913). Under Supreme Court Rule 2, a clerk making up the transcript need not include copies of his endorsement of filing on papers and records deposited with him. (This case was overruled on other grounds in *Richmond v. Enochs,* 109 Miss. 14, 21, 67 So. 649 (1915)).

Richmond v. Enochs, 109 Miss. 14, 21, 67 So. 649 (1915). Where the action was for libel, and a copy of the newspaper containing it was introduced in evidence, but was not marked as an exhibit and referred to by stenographer in his notes, a motion to strike from the record the bill of exceptions was sustained, although the alleged libel was made an exhibit to the pleadings, and so a part of the record; no cross-references being made thereto by stenographer, as required by Rule 2 of the Court.

Swaney v. White, 92 So. 2d 453 (Miss. 1957). Where appeal involved the question of which of two persons should have been appointed as guardian of an incompetent's estate, portions of the record containing orders and petitions filed and entered subsequent to hearing on such question and which threw no light on such question will be stricken under Rule 2; and where little more than a month before the appeal was scheduled to be heard, the Supreme Court sustained a motion to strike such pages, instead of ordering the record rebound so as to eliminate such pages, the Court will leave the record as it appeared, but will disregard such pages in consideration of the case.

United States Fidelity & Guaranty Co. v. White, 106 Miss. 28, 63 So. 329 (1913). A clerk who incorporates redundant matter in the record in violation of Rule 2, will not be allowed cost for such transcript.

Warren v. Clark, 94 So. 2d 321 (Miss. 1957). Where the Supreme Court could not determine, without reading the entire record on appeal and considering the briefs on the merits, whether or not former pleadings and decrees were properly part of the record on appeal, a motion under Rule 2 by appellant to strike from the record pages thereof should neither be sustained nor overruled until a consideration of the appeal on its merits.

Yazoo & M. V. R. v. M. Levy & Sons, 147 Miss. 211, 113 So. 325 (1927). Under Supreme Court Rule 2, commissions, notices, and certificates to take depositions should be omitted from record.

Rule 3. Agreed Transcript. By agreement of parties or their attorneys, made in writing, and attested by the Clerk of the Court in which any case may be pending or record existing (which agreement shall be filed and made a part of the transcript of such record), such parts of the record and proceedings as shall be agreed shall constitute the transcript of the record to be brought to this Court; and shall be certified as such and be considered a full transcript in this Court for the consideration and final adjudication of the cause here.

JUDICIAL DECISIONS

Austin v. Von Seutter, 170 Miss. 467, 151 So. 563 (1934). Court rule held not to authorize counsel to make the whole or any part of the original record of the trial court a part of the record on appeal.

Rowan Miller v. Peeples and Branum, 60 Miss. 45 (1882). It is not sufficient that the parties or their counsel agree that certain papers shall be considered and treated as a record; it is necessary for the clerk of the lower court to certify that the transcript, as far as it goes, is a transcript of the record remaining in his office. The agreement of counsel can neither create a record nor take the place of the authentication by the proper officer; it can only serve as a sufficient explanation of the omission of some part of the record.

RULE 4. SUGGESTION OF DIMINUTION OF RECORD. If a record be imperfect, diminution may be suggested by either party, and a writ of certiorari will be awarded, provided that if the filing of such a suggestion has been unnecessarily delayed to the prejudice of the opposite party, the writ will be awarded only upon such terms as the Court may impose, or it may be refused altogether.

JUDICIAL DECISIONS

Brown v. Sutton, 158 Miss. 78, 121 So. 835 (1931). If the clerk of the trial court refuses to make corrections where he has erroneously omitted or copied parts of the record on appeal, he may be required to act correctly by an order from the Supreme Court under petition for writ of certiorari, under Supreme Court Rule 4.

RULE 5. RECORDS AND PAPERS — HOW FILED. No record or other paper shall be considered as filed until so marked by the Clerk—process of this Court excepted—and the Clerk shall indorse the date of filing.

RULE 6. ASSIGNMENTS OF ERROR. (1) At least thirty days before the date when a case is set for hearing the appellant shall file an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel.

(2) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.[2]

(3) The right of an appellant to obtain a review in this Court of

[2]For an excellent discussion of appellate review in a criminal case, of errors made below but not properly raised and reserved, see 23 Miss. L.J. 42.

any ruling made in the trial court shall not depend in anywise upon his having filed in such court a motion for a new trial, or if such motion has been filed upon the grounds thereof being distinctly specified.

JUDICIAL DECISIONS

Aetna Ins. Co. v. Robertson, 131 Miss. 343, 95 So. 137 (1923), *cert. denied,* 263 U. S. 698 (1923), *writ of error dismissed,* 263 U. S. 673 (1923). Under rule 6, the test of the Supreme Court's right to review ruling of trial court is whether it could be assigned for error.

Anderson v. Laurel Oil and Fertilizer Co., 87 So. 2d 556 (Miss. 1956). Rule 6 providing that assignment of error should be filed by appellant at least thirty days before the case is set for hearing does not apply to cross-appeals and cross assignment of errors after the case is set for hearing. The custom has prevailed in this Court allowing cross-assignments of error to be filed at the time appellee's brief is due.

Coccora v. Vicksburg Light and Traction Co., 126 Miss. 713, 89 So. 257 (1921). The purpose of Rule 6 of the rules of the Supreme Court is to dispense with the necessity for a motion for new trial when the error assigned is based upon any ruling made in the trial, but in the absence of error in any of the rulings of the trial court, the rule in question does not dispense with the necessity for a motion for a new trial when the assignment of error is based solely upon objection to the amount of the verdict.

Crawley v. Ivy, 149 Miss. 764, 116 So. 90 (1928). Laws 1926, chapter 153 (Hemingway's Code 1927, section 2650), limiting the time within which an appeal to the Supreme Court can be taken, has no bearing on the time within which an assignment of error may be filed after record has been transferred to the Supreme Court, the filing of such assignments of error being regulated by Supreme Court Rule 6.

Where neither appellant nor appellee complied with requirements of Rule 6 of the Supreme Court relative to filing of assignments of error on or before the return day, neither can complain of the other therefor.

Dantone v. Dantone, 205 Miss. 420, 38 So. 2d 908 (1949). In a suit for partition of real property the Supreme Court, under Rule 6, will not pass upon the question of size of complainant's proportionate interest in the property when the lower court's failure to adjudicate question is not assigned as error.

Delta Cotton Oil Co. v. Elliott, 179 Miss. 200, 174 So. 550 (1937). An appellant must show error on original submission of appeal, and

the reviewing court will rarely consider new contention on suggestions of error, despite rule of court giving the court an option to consider plain errors overlooked by appellant.

Hattiesburg v. New Orleans & N. E. R., 143 Miss. 587, 108 So. 799 (1926). Under Supreme Court Rule 6, any error in awarding interest on judgment recovered against a city, and assessing five per cent damages, was waived when not raised by assignment of error on submission to the Supreme Court.

Jones v. Carter, 192 Miss. 603, 7 So. 2d 519 (1942). Under Rule 6 the option of the Supreme Court will be availed of and it will notice plain error not assigned, where such error is highly prejudicial.

Jones v. State, 207 Miss. 208, 42 So. 2d 123, (1949). Because of the public interest involved in the question of whether or not one may hold office at a place separate and apart from the domicile provided by him as a home for his family under the facts and circumstances of this case, it will be decided on appeal on its merits, notwithstanding the fact that no assignment of errors was filed in the Court as required by Rule 6.

Milner Hotels v. Brent, 207 Miss. 892, 43 So. 2d 654 (1949). Where it is argued in the brief of appellant that the verdict rendered by the jury is excessive notwithstanding the fact that appellant did not assign this as error, the Court, without passing upon what may be considered under Rule 6, was of the opinion that it was unnecessary to pass upon this question because a review of all the evidence in the case convinced them that the damages awarded by the jury were not excessive.

Newsom v. Newsom, 226 Miss. 697, 85 So. 2d 221 (1956). It is improper to raise new points or assignments for first time in the rebuttal brief of appellant, and where they are so raised, the Supreme Court, under Rule 6, is under no duty to consider the same.

Nickey v. State, 167 Miss. 650, 147 So. 324 (1933), *suggestion of error overruled,* 167 Miss. 650, 146 So. 859 (1933), *aff'd,* 292 U. S. 393 (1934). Alleged error in the calculation and statement in the court below of the amount due by appellants could not be rectified on motion to correct reviewing court's judgment where it was not separately and particularly assigned.

Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So. 2d 176 (1954), *dissenting opinion,* 74 So. 2d 731. Ordinarily, under Rule 6, the court will not take note of a proposition raised for the first time on suggestions of error, however, the court may, and usually will, do so where decision of the question is of grave importance to the public and affects

the rights of many people who are not parties to the litigation.

Robbins v. Berry, 209 Miss. 423, 47 So. 2d 846 (1950). When a chancery court has proceeded to a final decree in absence of a necessary party or parties and this is plainly disclosed by the record, the point will be raised by the Supreme Court of its own motion, pursuant to Rule 6, as a plain error, if two members of the Court think it ought to be done.

Wright v. Illinois Cent. R. Co., 196 Miss. 156, 16 So. 2d 381 (1944). Ordinarily the Supreme Court would not raise a question not assigned and argued as error. However, the court will raise a question not assigned as error, where two members of the court think that such ought to be done. Such is permissable under Rule 6 of the Court.

RULE 7. BRIEFS. (1) Appellant's brief shall be filed not later than thirty days before the date the case is set for hearing; appellee's brief shall be filed not less than ten days before the date the case is set for hearing, and any rejoinder brief shall be filed not later than three days before the date the case is set for hearing. This rule shall not apply where counsel have entered into a written agreement, filed with the Clerk, relative to the filing of briefs, but no brief shall be filed after the case has been submitted, except by leave of the Court first obtained.

(2) The contents of briefs are for the determination of counsel, but those briefs are of most assistance to the Court in which there precedes the argument of counsel: first, a concise statement of the case so far as essential to an understanding of the questions presented for determination with specific references to the precise places in the record where the points discussed may be found; and second, a "brief of the argument," which should consist of the points or propositions of law, or fact, to be discussed with the citation of authorities relied upon in their support.

(3) Briefs shall not exceed fifty pages[3] and shall be typewritten or printed; and if typewritten shall be in black, non-copying ink, double-spaced, on white paper, without the name of any person or advertising matter thereon. There shall be appended thereto a certificate that a copy of it has been delivered or mailed to opposing counsel; and if mailed, the certificate to appellant's original brief must contain the further statement that it was done not later than two days before the filing thereof.

(4) Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and this Court

[3]The provision as to the maximum length of briefs was promulgated by the Court on July 3, 1958.

will take such further action relative thereto as it may deem proper.

JUDICIAL DECISIONS

Bank of Roxie v. Lampton, 103 Miss. 398, 60 So. 325 (1912). Supreme Court Rule 7 (3) as to double-spacing applies both to original matter and quotations, and where a single-spaced brief is filed it will be remanded with leave to file a new brief within one week.

Barcroft v. Armstrong, 198 Miss. 565, 21 So. 2d 817 (1945). An omission to index properly the testimony and some briefs in disregard of Rule 7 will retard the Supreme Court's progress toward the truth. The increased demands upon judicial energy and zeal will not, however, overdraw the patience of the court and they will examine every issue with care.

Burnside v. Burnside, 86 So. 2d 333 (Miss. 1956). Supreme Court Rule 7 governing briefs for appellant and appellee is applicable to amicus curiae briefs, and they cannot be filed except in compliance with that rule as to time, except by written agreement of counsel, filed with clerk.

Ford v. City of Pascagoula, 87 So. 2d 558 (Miss. 1956). It has not been the policy of the Court to strike a brief under Rule 7 for late filing where the Court is satisfied that the delay was due to causes beyond the control of the attorney filing the same.

Frederic v. Board of Sup'rs. of Jackson County, 197 Miss. 293, 20 So. 2d 671 (1945). When counsel for appellant complies with Rule 7 (2) of Supreme Court, requesting that a concise statement of the case precede the argument of counsel, and counsel for appellee neither challenges his statement of facts of the case nor sets forth in his brief a different statement of the facts, appellee has no just cause of complaint if the Supreme Court accepts the appellant's statement of facts as being true.

Grace v. Floyd, 103 Miss. 201, 60 So. 135 (1912). Case remanded to docket with leave to file another brief where the attorney has his name, profession, and address printed in large letters in the middle of each page of the brief contrary to Rule 7 (3).

Shumpert v. Lee ounty, 197 Miss. 513, 20 So. 2d 82 (1944). Failure of counsel to observe the suggestions of Rule 7 (2) requiring an index of the propositions to be discussed, with supporting authorities, merely augments the task of the Court not inconsiderably.

Somersville v. Anderson, 202 Miss. 157 So. 2d 686 (1947). When appellant complies with Rule 7 (2) and counsel for the appellee neither

challenges his statement of the facts of the case nor sets forth in his brief a different statement of facts, he has no just complaint if this Court accepts the appellant's statement of facts as being true.

Water Valley v. State, 103 Miss. 314, 60 So. 325 (1913). Case remanded to docket with leave to file a new brief where appellant's brief is partly in black and partly in red ink in violation of Rule 7 (3).

RULE 8. RETURN DAYS. Except as may be otherwise provided by law, the First day of each term and the First Monday of January, May and July, shall be the return days for all appeals and all process in civil cases.

RULE 9. CALL AND ORDER OF DOCKET. (1) Except as may be provided by special order, all civil cases will be called for argument and submission in the order in which they stand on the docket.

(2) At least forty-five days before the First Monday of each month, the Clerk shall mail to each lawyer or firm of lawyers interested therein a list of cases to be called during that month; but the failure of an attorney to receive this list shall not entitle him to have a case in which he is of counsel passed or reinstated after submission or dismissal.

(3) On the assembling of the Court on each Monday, the entire number of cases set for the week will be called, with a view to the disposition of such of them as are not to be argued.

RULE 10. ARGUMENT OF COUNSEL. Only two counsel will be heard for each party on the argument of a case. The time allowed therefor will be determined by the Court in each case, and may be apportioned between the counsel on the same side in their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.

JUDICIAL DECISIONS

John E. Hall Commission Co. v. R. L. Crook & Co., 87 Miss. 445, 40 So. 1006 (1906). Oral arguments are never allowed on suggestions of error.

RULE 11. NO REVERSAL FOR HARMLESS ERROR. No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

JUDICIAL DECISIONS

Brown v. Addington, 102 So. 2d 365 (Miss. 1958). The Supreme

Court should apply Rule 11 with the utmost caution. Error alone is not sufficient to justify reversal. The situations where it is proper to apply Rule 11 fall into two general categories: (1) Where error is so slight that it can safely be said that it could not have misled the jury or prejudiced the complaining party, even where evidence is in substantial conflict, and (2) where the error is substantial but the evidence is such that from the whole record it appears that no impartial jury, duly mindful of the obligations of their oaths, could reach a different result.

Cecil Lumber Co. v. McLeod, 122 Miss. 767, 85 So. 78 (1920). The granting of an erroneous instruction for plaintiff was harmless, where it clearly appeared that no testimony was offered to the jury in support of the counts of the declaration to which it related, and it is reasonable to say that the jury was not misled or confused, within Rule 11, especially where the real issues were presented by other counts covered by instructions given.

Cobb v. State, 226 Miss. 181, 83 So. 2d 833 (1955). Admission of doctor's testimony concerning position the deceased would have had to have been in at the time he received certain gunshot wounds is error, but did not result in a miscarriage of justice and, under Rule 11, will not call for a reversal. This record consisted of 890 pages. It is a rare case where a trial of such length can be conducted without some some slight error creeping into the record. It was apparently for that reason that this court adopted Rule 11 in order to prevent the reversal of cases unless there had been a miscarriage of justice.

Dalton v. Madison, 216 Miss. 35, 61 So. 2d 688 (1952). Where misconduct of the jury did not result in a prejudice to the defendant this will not be grounds for reversal due to Rule 11.

Daniels v. Bush, 211 Miss. 1, 50 So. 2d 563 (1951). Where the chancellor reached the right result on the proof of the fact or want of essential proof, although he may have proceeded upon an erroneous view of the applicable law, the decree will not be reversed under Rule 11.

Evans v. Jackson City Lines, Inc., 212 Miss. 895, 56 So. 2d 80 (1951). An instruction is erroneous which requires the jury to refer to the declaration, but where the issues are adequately outlined in other instructions, and where the factual issue is narrow and comparatively uncomplicated, Rule 11 will not require a reversal for such error.

Gillespie v. State, 221 Miss. 116, 72 So. 2d 245 (1954). Refusal to grant defendant's oral motion for a continuance made after amendment of indictment to state true name of alleged victim was not error, es-

pecially where motion itself, and motion for new trial, failed to show by affidavit any way in which defendant was prejudiced, and thus was no grounds for reversal under Rule 11.

Grace v. State, 212 Miss. 785, 55 So. 2d 495 (1951). Under Rule 11, where guilt is evident, errors other than such as work a denial of constitutional rights, are not reversible.

Hatcher v. State, 92 So. 2d 552 (Miss. 1957). In prosecution of motorist for manslaughter under culpable negligence statute, improper statement of district attorney in closing argument that jury saw the good people of the county sitting out in the audience, and they were wondering whether "this sort of thing is going to be licensed" was not reversible error under the circumstances of the case and Rule 11.

Hatten v. State, 150 Miss. 441, 116 So. 813 (1928). Failure to instruct that forged check must have been uttered with intent to defraud is not ground for reversal under Rule 11 for no prejudice resulted.

Huddleston v. State, 220 Miss. 45, 70 So. 2d 14 (1954). The unpremeditated mentioning that accused just got out of the "Pen" by a state witness is not prejudical where court ordered jury to disregard the statement, and thus is no ground for reversal under Rule 11.

Jackson v. State, 218 Miss. 598, 67 So. 2d 520 (1953). The giving of two incorrect instructions for the State relating to an inference of malice from use of a deadly weapon did not result in prejudice to defendant when considered along with numerous instructions granted defendant, and thus under Rule 11 is no grounds for reversal.

Jones v. State, 104 Miss. 871, 61 So. 979 (1913). Supreme Court Rule 11 comes to us from the common law and in slightly different language is now enforced in many jurisdictions by virtue of statutes, rules of court or judicial decisions, and was followed in this state before the adoption of this rule.

Krebs v. McNeal, 222 Miss. 560, 76 So. 2d 693 (1955). Instruction that the plaintiff was required to prove either falsity of statements or malice was erroneous, but where great weight of evidence supported verdict for plaintiff, and defendant, as well as plaintiff, had obtained numerous correct instructions, the error was harmless; thus under Rule 11 no grounds for reversal existed.

Lampkin v. State, 214 Miss. 735, 59 So. 2d 335 (1952). When the competent evidence in a criminal case is such that no impartial jury duly mindful of the obligations of their oath could find any other verdict than one of guilty, error in admission or exclusion of evidence will

not require a reversal under Rule 11.

Producers Gin Association v. Beck, 215 Miss. 263, 60 So. 2d 642 (1952). Although a granted instruction was erroneous as to the required quantum of proof, there will be no reversal under Rule 11 if the Court is unable to say that the judgment has resulted in a miscarriage of justice.

Richey v. State, 220 Miss. 790, 72 So. 2d 152 (1954). Arguments of the district attorney, although improper under the facts of the case, were not prejudicial, and thus were not grounds for reversal under Rule 11.

Skinner v. State, 198 Miss. 505, 23 So. 2d 501 (1945) Error in admitting evidence of an attempt and three consummations of incest, under an indictment containing one count charging a single incestuous offense, was prejudicial, and consequently Supreme Court Rule 11, providing that no judgment shall be reversed for harmless error, was inapplicable.

Smyley v. State, 224 Miss. 118, 79 So. 2d 539 (1955). Where it was error in a murder trial to instruct that malice aforethought could be inferred from unlawful and deliberate use of deadly weapon, but where evidence was overwhelming that defendant was guilty of murder, error in granting the instruction was harmless and thus no reversal under Rule 11.

Sumerall v. State, 206 Miss. 878, 41 So. 2d 51 (1949). Under Rule 11 of the Supreme Court no judgment shall be reversed on ground of misdirection to the jury, or improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless it shall affirmatively appear from the whole record that such judgment has resulted in a miscarriage of justice.

Sykes v. City of Crystal Springs, 216 Miss. 18, 61 So. 2d 387 (1952). When testimony has clearly established the guilt of the accused, mere procedural errors will bring Rule 11 into play and the judgment of conviction will not be reversed unless it affirmatively appears from the whole record that there has been a miscarriage of justice.

Virginia Countryman v. State, 204 Miss. 117, 37 So. 2d 21 (1948). Where all of the errors complained of are harmless in the face of the testimony in the record, the case must be affirmed under Rule 11.

West v. State, 218 Miss. 397, 67 So. 2d 366 (1953). In homicide prosecution, where a photograph taken of the victim about two weeks before her death was introduced in evidence for consideration of the

jury in connection with the gruesome appearance of the body after death, even though improper, such error was not prejudicial, and under Rule 11 will not be grounds for reversal.

RULE 12. NEW TRIAL AS TO PART. In case a judgment is reversed, and a new trial granted, it shall be only a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.

JUDICIAL DECISIONS

Reynolds v. Snowden, 92 So. 2d 232 (Miss. 1957). In a personal injury suit, plaintiff was an incompetent witness to establish her claim for damages as against defendant administratrix' intestate, so as to require reversal of judgment on the jury's verdict for plaintiff and remand of the case for new trial on issue of damages alone as to such defendant in accordance to Rules 12 and 13.

RULE 13. NEW TRIAL AS TO DAMAGES ONLY. When a judgment is reversed and a new trial ordered because the damages are excessive or inadequate, and for no other reason, such judgment shall be set aside only in respect to damages and shall stand good in all other respects.

JUDICIAL DECISIONS

Flournay v. Brown, 200 Miss. 171, 26 So. 2d 351 (1946). In an action by a landlord for $10,500 damages for breach of rental contract, where the landlord introduced evidence of $2,882.67 damages for repairs to tenant houses and barns, evidence of $5,577.50 damages with reference to conditioning and cultivation of plantation and evidence of damages ranging from $2,000 to $3,750 with reference to clearing and putting woodland into cultivation, and the jury found for the landlord but awarded only $1,000 damages against the tenant who had introduced very little evidence on the question of damages, judgment as to liability will be affirmed, but the case will be remanded for reassessment of damages pursuant to Rule 13.

Reynolds v. Snowden, 92 So. 2d 232 (Miss. 1957). In a personal injury suit, plaintiff was an incompetent witness to establish her claim for damages as against defendant administratrix' intestate, so as to require reversal of judgment on the jury's verdict for plaintiff and remand of the case for a new trial on the issue of damages alone as to such defendant in accordance to Rules 12 and 13.

Vaughan v. Bollis, 221 Miss. 589, 73 So. 2d 160 (1954). In a suit for injuries sustained by plaintiff, who was struck by an automobile while allegedly standing on the shoulder of the highway awaiting a ride, a finding that plaintiff had stepped onto the highway in front of the

automobile was against the weight of the evidence, and such finding did not warrant the jury in applying the comparative negligence statute in determining plaintiff's damages. Consequently, in the light of the injuries sustained by plaintiff, a verdct of $300 was grossly inadequate, warranting a reversal of the case for a new trial in order that another jury might pass upon the question of damages. In so doing, all facts should be presented to the jury on the question of the negligence of all parties, including plaintiff, and the jury will have the right to apportion damages under the comparative negligence statute notwithstanding Rule 13.

RULE 14. SUGGESTION OF ERROR. (1) The losing party may within fifteen days after an opinion is handed down file a written suggestion of error of law or fact therein. Upon good cause shown this time may be extended to thirty days; but an application for such an extension must be filed within the original fifteen days.

(2) An adjournment of Court less than fifteen days after the rendition of a judgment shall not preclude the filing of a suggestion of error therein, but the same may be filed with the Clerk within the time prescribed for presenting such suggestion of error to the Court, whereupon all proceedings on the judgement shall be stayed until it shall be acted upon at the next session of the Court, unless a majority of the judges of the Court shall certify in writing to the Clerk prior to the next term that they have considered the suggestion of error and have determined to overrule it; upon receipt of such certificate such proceedings shall be had as if a suggestion of error had not been filed.

(3) No reply to a suggestion of error shall be filed, unless the Court, by special rule, otherwise, shall call therefor. But no suggestion of error will be sustained to the prejudice of the adverse party until he has been given an opportunity of replying thereto. After a suggestion of error has been sustained, or overruled, by the Court, no further suggestion of error shall be filed by any party.

(4) Any suggestion of error containing language showing disrespect or contempt for this Court will be stricken from the files, and the Court will take such further action relative thereto as it may deem proper.

JUDICIAL DECISIONS

Aetna Ins. Co. v. Robertson, 131 Miss. 343, 95 So. 137 (1923), *cert. denied,* 263 U. S. 673 (1923), *writ of error dismissed,* 263 U. S. 673 (1923). Under Rule 14 of the Supreme Court a valid suggestion of error must be filed within fifteen days after the Court's judgment was rendered.

Amite Co. v. Mills, 138 Miss. 222, 102 So. 737 (1925). After a suggestion that the Supreme Court erred in rendering a judgment either of affirmance or reversal has been sustained, or overruled, no further suggestion of error should be filed in that cause by any of the parties thereto, and if such a suggestion is filed the court will decline to consider it under Rule 14.

Arnold v. Spears, 65 So. 2d 296 (Miss. 1953). The Supreme Court though it had granted timely application for an extension of time in which to file a written suggestion of error under Rule 14, could not entertain the suggestion of error when it was filed more than 30 days after the opinion was handed down.

Bacot v. Holloway, 140 Miss. 120, 104 So. 698 (1925). A motion to amend the judgment of the Supreme Court, so as to change the award of court costs therein made, is a suggestion of error, and must be filed within the time allowed therefor by Rule 14.

Ball v. State, 203 Miss. 521, 36 So. 2d 159 (1948). Second suggestion of errors filed after expiration of time for filing suggestion of errors, without permission, and in violation of Rule 14 of the Supreme Court, is not a part of the record.

Burton v. Redman, 220 Miss. 705, 71 So. 2d 772 (1954). After rendition of a judgment of affirmance by the Supreme Court on appeal, the filing of a suggestion of error had the effect of suspending such judgment of affirmance, so that parties who had three months for performance of the condition of judgment, had three months after disposal of the suggestion of error by the Supreme Court to perform such condition.

Canal-Commercial Trust & Savings Bank v. Brewer, 143 Miss. 184, 109 So. 8 (1926). Motion to correct judgment, merely suggesting that the court erred in affirming the degree of the lower court, is a second suggestion of error, and under Rule 14 will be dismissed.

Continental Southern Lines v. Klaas, 217 Miss. 795, 65 So. 2d 575 (1953). Where questions submitted to the Supreme Court on the merits of the case have been finally disposed of by the Court in a prior opinion and judgment on suggestion of error, the same questions will not again be considered by the Court on further suggestion of error, because of Rule 14 (3).

Guynn v. Shults, 223 Miss. 232, 78 So. 2d 793 (1955). It is inherently within the power of the Supreme Court to enforce reasonable rules against disrespectful and contemptuous language directed to the Court, and a brief, on suggestion of error, which contains such language

will be ordered stricken from the files under Rule 14 (4).

Hattiesburg v. New Orleans & N.E.R., 143 Miss. 587 (1926). Procedure for obtaining reconsideration of award of interest on a judgment against a city, if properly raised by assignment of error, is by suggestion of error, which must be filed within the time allowed under Supreme Court Rule 14.

Home Insurance Co. v. Watts, 93 So. 2d 848 (1957). The Supreme Court can relax or dispense with the Supreme Court Rules to prevent injustices, and it would be appropriate, where the question of jurisdiction is involved, to dispense with Rule 14 prohibiting the filing of a second suggestion of error.

Inman v. Travelers Ins. Co., 154 Miss. 611, 122 So. 537 (1929). Motion to have a former judgment on appeal set aside, in so far as it adjudged court costs, and to have a different judgment rendered relative thereto, is a suggestion of error, and, not having been filed within the time allowed under Rule 14 for filing suggestions of error, it must be dismissed.

Johnson v. St. Catherine Gravel Co., 218 Miss. 713, 67 So. 2d 712 (1953). There is no provision for a suggestion of error to the action of the Court on motions to dismiss and docket.

McCrory v. Donald, 118 Miss. 596, 79 So. 801 (1918). Motion to correct judgment of remand, filed after adjournment and more than 15 days after rendition, not predicated on mistake nor on grounds contained in Code 1906, section 1016, is a suggestion of error within Rule 14, and must be overruled as not filed within time fixed.

Shearron v. Shearron, 219 Miss. 27, 68 So. 2d 71 (1953). Where appellant's suggestion of error is overruled and the appellee's suggestion of error is sustained in part and overruled in part, the latter should not have been sustained in part or in whole without first calling on the appellants for a reply under Rule 14 (3).

Snowden v. Webb, 217 Miss. 664, 64 So. 2d 745 (1953). A second suggestion of error cannot be entertained under Rule 14.

White v. State, 190 Miss. 589, 195 So. 479 (1940). A suggestion of error under Rule 14 is, to all intents and purposes, a request for rehearing, and may be filed without an order of the court if done within the original fifteen days allowed, or within the extended time granted by order of the court therefor; and in such event it suspends the judgment and also the effect and operation of any mandate issued thereon until the suggestion of error shall have been disposed of.

The Supreme Court was not divested of jurisdiction to hear a manslaughter case on suggestion of error after mandate was issued to and received by the court below upon reversal of the case by a division of the Supreme Court, where within the fifteen days allowed for filing such suggestion of error, an extension of time was granted so as to allow thirty days for filing the same, as shown by an order duly entered upon the minutes of the court prior to the expiration of the original fifteen days allowed. This is so notwithstanding that no order was entered in the Supreme Court, nor notice given to the court below, recalling such mandate at any time prior thereto.

Wilder v. Currie, 97 So. 2d 384 (Miss. 1957). Motion to remand case before the Supreme Court on appeal to the trial court for introduction of additional evidence would be denied where the motion constituted, in effect, a suggestion of error not filed within the time allowed under Rule 14, and did not fall within the narrow limitations of the doctrine authorizing remands for further proof.

RULE 15. PAPERS OUT OF OFFICE. The person through whose fault a record is not in the courtroom when the case is called for submission shall be fined the sum of twenty-five dollars.

RULE 16. MOTIONS. (1) Every Saturday shall be motion day; and if counsel be not present, and have no briefs filed when their motions are regularly called, such motions shall be dismissed; and no motion once disposed of, or dismissed, shall again be heard. No motion will be considered, until the opposite party shall have had at least three full day's notice, by mailing, or delivery to such party, a copy of same.

(2) Any party desiring oral argument on a motion shall give at least two days advance notice to the Clerk and to opposing counsel.

JUDICIAL DECISIONS

Allen v. First National Bank of Jackson, 218 Miss. 77, 67 So. 2d 709 (1953). On a motion to dismiss appeal, all that was required by Rule 16 was that both the motion and the brief contain a certificate of counsel for appellee to the effect that a true and correct copy of the said motion and brief were sent by United States mail, postage prepaid, to the attorneys for the appellant, more than three full days prior to the motion day to which the motion to dismiss was returnable.

Germian v. Harwell, 108 Miss. 521, 60 So. 212 (1913). Compliance with Rule 16 as to notice to opposite party may be shown by proper certificate signed; unsigned memorandum is not sufficient and a motion to continue will be remanded to docket on failure to comply with the rule.

Goehns v. Wallace, 108 Miss. 489, 66 So. 978 (1914). Motion to expunge parts of record dismissed where no brief was filed or no counsel appeared as required by Rule 16, when motion called for hearing.

Home Insurance Co. v. Watts, 93 So. 2d 848 (Miss. 1957). The Supreme Court can relax or dispense with Supreme Court Rules to prevent injustice, and it would be appropriate, where a question of jurisdiction is involved, to dispense with Rule 16 providing that a motion once disposed of will not be heard again.

Lewis v. Lewis, 203 Miss. 355, 35 So. 2d 441 (1948). Where husband filed grounds for denial of wife's motion for allowance of a solicitor's fee, but wife filed no brief in support of her motion, dismissal of motion by Supreme Court was required under Rule 16.

Spears v. City of Oxford, 87 So. 2d 61 (Miss. 1956). Under Rule 16, an appellee's argument cannot be sustained where he has renewed a motion and insists that it be sustained after the same motion had already been heard and overruled by the Court.

RULE 17. MOTION TO DISMISS — WHEN WAIVED. When a motion is made to dismiss, and counsel for the motion either withdraws it or suffers it to be dismissed for want of prosecution, it shall be considered a waiver of the defect on which the motion was based, unless it be so material that no judgment can be given.

RULE 18. DISMISSED CAUSE — HOW REINSTATED. No cause that has been dismissed shall be reinstated without an affidavit setting forth probable error in the proceedings.

JUDICIAL DECISIONS

Edmonds v. Delta Democrat Publishing Co., 221 Miss. 785, 75 So. 2d 73 (1954). Where an appeal was dismissed and never properly reinstated by Court order, such dismissal was final and the appeal was improperly on the Court docket. Motion to remove the case from the docket was sustained under Rule 18 where no proper affidavit was filed.

Nix Cafeteria v. Burton, 226 Miss. 207, 84 So. 2d 164 (1955). After dismissal of appeal by the Supreme Court in a workmen's compensation case, where employer filed motion to reinstate, but offered no excuse why he had not contested a previously granted motion and had not complied with Rule 18, such would be sufficient grounds for overruling motion.

Warren v. State, 165 Miss. 783, 144 So. 698 (1932). Rule 18, relating to reinstatement of a cause which has been dismissed, has been construed to require a statement, not merely that there is merit in the ap-

peal, but of the substance of the ground for which reversal is asked, with sufficient facts to show the pertinency of such ground for reversal.

RULE 19. MOTION TO RETAX COSTS — STATUTORY PENALTY. All motions to retax costs or for the awarding or disallowance of 5% damages on appeal or to correct any judgment shall be filed within sixty days from the entry of the final judgment in the case. Provided, however, that when such allowance or disallowance of costs or other matter affecting the judgment has been incorporated in the opinion, the rule applicable to the filing of suggestions of error shall apply.

JUDICIAL DECISIONS

Allen v. First National Bank of Jackson, 85 So. 2d 816 (Miss. 1956). Where judgment of the Chancery Court was affirmed by the Supreme Court on October 3, 1955, and motion before the Supreme Court for retaxing costs was not filed until February 2, 1956, the motion came too late and was required to be overruled under Rule 19.

Neshoba County Gin Association v. Johnson, 87 So. 2d 68 (Miss. 1956). Appellant was given leave to file a motion to retax costs within sixty days from entry of final judgment, as provided by Rule 19, where the cost bill of the circuit court clerk was apparently grossly excessive.

Watkins v. Taylor, 216 Miss. 822, 65 So. 2d 461 (1953). Where the Court did not think there was sufficient time between the adopting of the revised Rules and the appeal of a case for members of the Bar to familiarize themselves with the details as to the changes, Rule 19 was relaxed by virtue and under the authority of Rule 33.

RULE 20. DOCKET — HOW CALLED — DELAY CASES. At each term of the Court the docket shall be taken up in its order. But on regular motion-day, by motion entered for that purpose, causes may be submitted on a suggestion that they are brought here for delay, and if satisfied of the truth of such suggestion, the Court will take up such causes first, and make proper disposition of them.

RULE 21. FAILURE TO PROSECUTE — CAUSE DISMISSED. When any case shall be called for trial in its order, if no counsel appear and no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution.

JUDICIAL DECISIONS

Rodgers v. Bolden, 10 So. 2d 551 (Miss. 1942). Where the record of the case on appeal contained neither assignment of errors nor brief for appellant, appeal was dismissed.

Shaffer v. State, 46 So. 2d 545 (Miss. 1950). Notwithstanding ap-

pellant's failure to file assignment of error and brief in accordance with Rules 6 and 7, and notwithstanding that such case is subject to dismissal under Rule 21 because of such default, nevertheless it is the policy of the court in capital cases to read the record and search for errors.

RULE 22. CALCULATIONS. (1) When a party relies on an excess in the calculation of interest or damages as a reason for reversing a judgment, a true calculation shall be presented to the Court, in writing and figures, with a certificate by some counsellor not interested in the cause, that the calculation is correct; and no such error will be noticed unless so presented to the Court.

(2) When a complaint is made, in a motion to retax the costs incurred in this Court, that a fee allowed based on the number of words of an instrument, or transcript thereof, or the transcript of the record as an entirety, is incorrect, the motion shall be accompanied by a written statement of the true number of such words, with a certificate of its correctness by a competent disinterested person; without which no such complaint will be considered.

RULE 23. AGREEMENT OF COUNSEL. No agreement between counsel will be regarded unless reduced to writing, and signed and filed by them.

JUDICIAL DECISIONS

Williams vs. Meridian Light and R. Co., 114 Miss. 73, 75 So. 59 (1917). Disputed oral agreement of counsel is not regarded as an excuse for delay in filing appeal within time provided by law.

RULE 24. AUTHORITY OF COUNSEL — WHEN REQUIRED. On motion supported by affidavits, any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting any appeal in this Court; and on failing to produce such authority, or furnish such evidence, the appeal may be dismissed.

RULE 25. CRIMINAL DOCKET — WHEN CALLED. Criminal cases may be set by the Chief Justice for call on any Monday when the Court is sitting, and in such numbers as he may designate.

JUDICIAL DECISIONS

Bennett v. State, 99 Miss. 644, 55 So. 482 (1911). Cause is on the docket for trial the Monday first after expiration of 20 days from taking of appeal. The rule of Court fixing the time of hearing the criminal docket is within the power of the Court and consistent with law, being necessary to enable the Court to properly handle the business before it.

RULE 26. WHEN APPELLEE MAY NOT WAIVE TIME. After a case has been called on the docket, the appellee shall not be permitted to waive the time within which citation is required to be served, nor to enter his appearance for trial of the cause at that term.

RULE 27. ATTORNEYS MUST BE ADMITTED TO PRACTICE. Attorneys at law who have not been admitted to practice in this Court shall not be permitted to argue orally, or file briefs or any paper in any cause in this Court.

STATUTES

Miss. Code Ann. § 8664. Oath in each court. Every attorney and counselor at law, before he shall be permitted to practice, shall produce his license in each court where he intends to practice, and in the presence of such court, shall take the following oath or affirmation to wit:

"I do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of this court, according to the best of my learning and ability, and with all good fidelity as well to the court as to the client; that I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the Constitution of the State of Mississippi so long as I continue a citizen thereof. So help me God."

And thereupon the name of such person, with the date of his admission shall be entered in a roll or book to be kept in each court for that purpose.

RULE 28. PAPERS NOT FILED AFTER SUBMISSION. The Clerk shall not file with the papers of any cause any paper after the cause has been argued, or submitted, except by leave of the Court.

RULE 29. ORIGINAL PAPERS — WHEN CONSIDERED. Whenever it shall, in the opinion of the Judge or Chancellor, be necessary or proper that original papers of any kinds should be inspected in the Supreme Court, such Judge or Chancellor may make such rule or order for safekeeping, transporting and return of such original papers as to him may seem proper; and such papers will be considered in connection with the transcript.

JUDICIAL DECISIONS

Austin v. Von Seuter, 170 Miss. 467, 151 So. 563 (1934). Original of papers constituting part of the record in the trial court may be sent up to the Supreme Court on appeal only when the Supreme Court, trial judge, or chancellor makes order therefor.

Brown v. Sutton, 158 Miss. 17, 121 So. 835 (1929). Original records

which are sent to the Supreme Court under Supreme Court Rule 29, remain a part of the trial court records.

Gulf Coast Stevedoring Co. v. Gibbs, 124 Miss. 188, 86 So. 582, 763 (1920). The order and recitals thereof in the judge's order sending original papers up for inspection under Supreme Court Rule 29 are not considered as evidence in the record, and the court will limit its consideration to the instructions and verdict without reference to recitals in the order.

Planter's Oil Mill v. Yazoo & M. V. R., 150 Miss. 813, 117 So. 242 (1928). Under Rule 29 it is proper, where a litigant desires original papers, or any of them, to be sent up, that he apply to the trial judge for such order.

Planter's Oil Mill v. Yazoo & M. V. R., 119 So. 168 (Miss. 1928). It is not the purpose of Rule 29 of this Court to permit originals to be sent up in lieu of a transcribed copy thereof, but said rule was intended to give this Court that aid that may be derived from an inspection and comparison of documents, maps, writings, etc., which would in the opinion of the trial judge enable this Court to determine more correctly the true effect of the various papers, signatures, etc.

Sovereign Camp, W. O. W. v. Duncan, 175 Miss. 724, 165 So. 546 (1936). An original paper introduced as evidence on the trial could be made part of the record on appeal only pursuant to the court rule providing that the judge or chancellor shall make the necessary order in a proper case, and such relief could not be granted on a motion for certiorari to bring up such paper and have it made part of the record on appeal.

Spitchley v. Covington, 181 Miss. 678, 177 So. 31 (1937). Original exhibits should be sent to the Supreme Court only when an inspection of them, instead of copies thereof, would aid the court in determining the matter before it. Where there appeared to be no reason why original exhibits sent to the Supreme Court by order of the trial court could not have been copied into the record, such exhibits were sticken from the record and returned to the clerk of the lower court.

RULE 30. COSTS PAID BY APPELLANT — WHEN MANDATE RETAINED. When costs are awarded in this Court against the appellee, and there shall have been a return of nulla bona to an execution against him, and the costs shall be paid by appellant, no mandate shall issue upon the application of the appellee, until he shall pay into the Court, for the use of appellant, the costs paid by him.

RULE 31. PENALTY FOR VIOLATIONS OF THE RULES OF THIS COURT.

Any litigant, who by himself or his counsel, fails to comply with any of the provisions of the foregoing rules, shall, on motion of the party aggrieved, be taxed with such proportion of the appeal costs as in the judgment of the Court may seem just and proper, in addition to any other penalty which may be provided by the rules.

RULE 32. REMEDIAL WRITS. No application for supersedeas, or any other writ or remedial process mentioned in Section 1657, Code 1942, except in cases of greatest emergency, shall ever be acted on, in any case pending in any court, by any member of the Supreme Court, ex parte; but every such application, except in cases of greatest emergency, shall be accompanied by a certificate of written notice served on the opposite party, or his counsel, or some of them, at least three days before the hearing; and all such applications will be acted upon only when both sides are represented at the hearing, or after such three days notice, duly certified as above.

STATUTES

Miss. Code Ann. § 1657. Remedial writs grantable by Supreme and circuit judges and chancellors. The judges of the Supreme and circuit courts and chancellors, in term time and in vacation, may severally order the issuance of writs of habeas corpus, mandamus, certiorari, supersedeas and attachments, and grant injunctions and all other remedial writs, in all cases where the same may properly be granted according to right and justice, returnable to any court, whether the suit or proceedings be pending in the district of the judge or chancellor granting the same or not. The fiat of such judge or chancellor shall authorize the issuance of the process for a writ returnable to the proper court or before the proper officer; and all such process or writs may be granted, issued and executed on Sunday.

JUDICIAL DECISIONS

Alexander v. Johnson, 165 Miss. 721, 138 So. 329 (1931). Miss. Code Ann. § 1657 deals only with original jurisdiction; thus the power of the judges of the Supreme Court under this section is the same as, and is no greater than, that of the circuit judges and chancellors. From this it follows that a judge of the Supreme Court acting severally has no power under this section to vacate or set aside an interlocutory order made by a chancellor or circuit judge in a cause or matter pending before the circuit or chancery courts and which is not then in the state of its present record, appealable to the Supreme Court.

Buckler v. State, 173 Miss. 350, 161 So. 683 (1935). Under section 1657 of the Miss. Code, a writ of error coram nobis may be granted by judges of the Supreme Court, although the trial judge refused to grant

such a writ and although the writ is not in aid of the appellate jurisdiction of the Supreme Court, since the writ is remedial.

Kramer v. Holster, 55 Miss. 243 (1877). The terms of granting a supersedeas may be fixed by the judge who grants it, and the proper mode of proceeding must be determined upon general principles.

Wetzel v. State, 76 So. 2d 194 (Miss. 1954). Although the refusal by the circuit judge to issue a writ of coram nobis is not an appealable action, the Supreme Court will consider the petition in Banc in a regular term on its merits, as being addressed to the inherent constitutional powers of the Court in its revisory capacity with reference to a case pending before it and also as being within the orbit of Code Section 1657.

RULE 33. RULES MAY BE SUSPENDED. These rules shall be considered as general rules for the government of the Court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the Court in any case where it shall be manifest to the Court that a strict adherence to them will work surprise or injustice.

JUDICIAL DECISIONS

Davis v. Rosenthal Plywood Sales Co., 207 Miss. 574, 42 So. 2d 750 (1949). The Rules of the Supreme Court are based on sound reason and long experience, and must be followed in all cases, except where suspended in accordance with Rule 33.

Ford v. City of Pascagoula, 87 So. 2d 558 (Miss. 1956). Where final 33 the Court may relax Rule 7 and not strike a brief on account of late filing where the delay was due to some cause beyond the control of the attorney filing same.

Home Insurance Co. v. Watts, 93 So. 2d 848 (Miss. 1957). Under Rule 33 the Supreme Court can relax or dispense with Supreme Court Rules to prevent injustice, and it would be appropriate, where a question of jurisdiction is involved, to dispense with Rules 14 and 16.

Van Norman v. Van Norman, 45 So. 2d 847 (1950). Where final order was entered in the trial court on June 13, 1949, and shortly thereafter notice of appeal and bonds were filed, and on July 27, 1949, the reporter sent the transcript to the clerk, but the record had not been filed in the Supreme Court when motion to docket and dismiss was filed, but was filed a few days later and prior to the Court's order on the motion, special considerations justified refusal to dismiss the cause and brought Rule 33 into play.

Watkins v. Taylor, 216 Miss. 822, 53 So. 2d 225 (1953). Rule 33 will be used where the Court does not think there has been sufficient time for Members of the Bar to familiarize themselves with the details as to changes in the revised Rules.

RULE 34. FELONY CASES, WHERE APPELLANT IS ON BAIL. After the submission of a felony case in which appellant is on bail, the Court will, by special order, fix the day for the rendition of its judgment. On the day so fixed, appellant must appear before the Court to receive judgment, unless he shall have surrendered himself to the Sheriff of the County in which the court rendering the judgment appealed from was held.[4]

STATUTES

Miss. Code Ann. § 1180. Bail after conviction of felony discretionary with court in some instances and matter of right in all other felony cases. A person convicted of treason, murder, rape, arson, burglary or robbery shall not be entitled to be released from imprisonment pending an appeal to the Supreme Court, unless it be so ordered by the judge who presided at the conviction, or the judge of the district in which conviction was had, or a judge of the Supreme Court in vacation of said court; and the making of such order shall be a matter of discretion with either the court or judge to be exercised with the greatest caution, and only when the peculiar circumstances of the case render it proper. A person convicted of any felony other than those enumerated in the foregoing paragraph shall be entitled to be released from imprisonment on bail pending an appeal to the Supreme Court.

Miss. Code Ann. § 1181. Amount of bail fixed by judge. Where an order shall be made as provided in the last section, the court or judge shall designate the amount of the bond to be given; and the clerk of the court where the conviction was had shall take bond of the appellant with resident sureties or one or more guaranty or surety companies authorized to do business in this state, to be approved by him, in the sum fixed by the order, payable to the state, and conditioned for the appearance of the party in the Supreme Court and circuit court to abide by and perform such sentence or judgment as may be rendered in the case; or the Supreme Court or circuit court, or any judge of either court making such order for bail, may take and approve the bond re-

[4]Under Rule 34, the practice of the Court where a criminal conviction of a felony is to be affirmed, and the appellant is out on bond, is through the clerk's office to send a notice to the sheriff of the county of conviction, directing him to promptly obtain custody of appellant. This notice is sent to the sheriff on the Wednesday preceding the Monday upon which the affirmance will be handed down. The purpose of this procedure is to preclude the felon on bail from evading custody after affirmance of his conviction. The Clerk's office also sends to counsel for appellant a notice requiring appellant to surrender himself to the sheriff.

quired to be given, or it may be taken by the sheriff in whose custody such prisoner may be, and shall be sent to the Supreme Court. All the provisions of the chapter entitled "Criminal Procedure," on the subject of bail, as far as applicable, shall be applicable to bail for the appearance of any person before the Supreme Court.

Miss. Code Ann. § 1979. Full time of sentence in case of affirmance. In case of an affirmance by the Supreme Court of a judgment for imprisonment, if the appellant had remained in prison pending the appeal, the time of imprisonment shall be credited to him, but if he has been on bail, the Supreme Court shall fix the time for the commencement of his imprisonment, under the judgment of affirmance, so as to cause him to suffer the full time of imprisonment fixed by the judge of the court below.

RULE 35. (1) The Court sittings for the hearing of arguments will be held on the First, Second, Third and Fourth Mondays of each month, beginning with the Second Monday in September and ending with the Second Monday in June, and will also be held on such other days as the Chief Justice may designate, and sittings on any Monday may be dispensed with, or sittings on the Fifth Monday of the month may be had, by direction of the Chief Justice.

(2) For the convenient dispatch of business the Court will ordinarily sit in groups of five Judges. The Chief Justice shall be the Presiding Judge of one group and the Presiding Judge of the other group shall be the Judge thereof who has been for the longest time continuously a Member of the Court, and in the event no Judge of a group has been continuously a Member of the Court for a longer time than the others, the Court shall designate by an order entered upon the minutes when sitting in banc which of said Judges shall be the Presiding Justice thereof. In the absence of the Presiding Judge, the Judge of the group who has been for the longest time continuously a Member of the Court shall be the Acting Presiding Judge thereof; and in the event two Judges of a group other than the Presiding Justice thereof shall have had the same period of continuous service, the Court shall designate by order entered upon its minutes, when sitting in banc, which of said Judges shall preside in the absence of the Presiding Judge.

(3) The Chief Justice and the Presiding Justice shall ordinarily sit and preside during alternate weeks and the minutes of a group shall be signed by the Judge thereof then presiding. The other four members of the group shall be selected from the remaining Judges of the Court by the Chief Justice.

(4) The Court may sit in banc on any day of a term without prev-

ious notice thereof being given; but when a case is ordered to be argued before the Court in banc, the Clerk, at least one week before the day set for hearing, shall mail a notice thereof to each lawyer or firm of lawyers interested therein.

(5) In the event any Judge of the Court within fifteen days after a judgment has been rendered, or an order entered by any group, or while a suggestion of error therein is pending, shall certify in writing filed with the Clerk that in his opinion such order or judgment is in conflict with a prior decision of the Court, or of any group thereof, the order or judgment shall be set aside by order entered on the minutes of the first session of either group thereafter; and the Chief Justice cause the full Court, or a quorum thereof, to assemble in a conference at a convenient time for the decision of the case, and the judgment agreed on shall be entered at any sitting of any group of the Court.

(6) In case of the absence or disability of the Chief Justice, his duties shall be performed by the Presiding Judge.

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FOREWORD

In his well written article entitled "Some Suggestions As to Oral Arguments and Written Briefs in the Supreme Court of Missssippi," I think that Judge Roberds has given to the members of the Bar something of real and substantial benefit. It would be difficult to conceive of how a lawyer engaged in the writing of a brief or preparing to make an argument before an appellate court could spend an hour of his time to better advantage than by a careful and studious reading of that article in its entirety. If the reader of this foreword has heretofore read the article, I assure you that if you should read it again the time required for that purpose shall have been well spent, indeed.

Due to the complexities of modern business and industry, many of the lawsuits of today are more difficult, both for the bench and for the bar, to solve than they they were in the earlier days. Therefore, the suggestions of Judge Roberds as to how the members of the bar may be most helpful to the court in their oral arguments and written briefs are very timely. These suggestions are respectfully submitted for your serious consideration.

Harvey McGehee
Chief Justice
Supreme Court of Mississippi
Magnolia, Mississippi
July 7, 1958

SOME SUGGESTIONS AS TO ORAL ARGUMENTS AND WRITTEN BRIEFS IN THE SUPREME COURT OF MISSISSIPPI

Revised July 1, 1958

*W. G. Roberds**

I. Oral Arguments

1. Request—necessity for.
2. Time Allowed.
3. Physical Mannerisms.
4. Objects.
5. Introductory Statement.
   (a) Illustration
   (b) Illustration
   (c) Illustration
6. Statement of Facts and Arguments.
7. Questions by the Court.

II. Briefs

1. Time within which to file.
2. Physical Form:
   (a) Typewritten or printed—Rule 7 (3)
   (b) Book form
3. Arrangement—illustrated style of case and general index:
   (a) Introduction
   (b) The Pleadings
   (c) Statement of the Facts
   (d) Argument—suggestions as to form and substance

The hope of making some suggestions of practical benefit to the members of the bar has caused me to comply with the request of the Editors of the *Law Journal* to write this article. It has been prepared, in form and substance, with that hope in view.

*Associate Justice, Supreme Court of Mississippi, and former professor of law, University of Mississippi.

I. Oral Arguments

1. *Request—necessity for*: Any lawyer engaged in the appeal on either side is permitted to argue his case orally before the court, provided he makes such desire known to the court when the case is called, whether his opponent argues or not. A request for oral argument, if desired, is usually, and properly should be, contained in the brief, so that opposing counsel will have notice, with opportunity to be present. However, such written request in the brief is not a prerequisite to the right to make oral argument if proper request is made orally on the call of the case; and, although the brief contains such notice, it is nevertheless necessary that announcement be made on the call, else the court will understand oral argument is not desired. However, even when no request is made on the call, the court may, and often has, permitted oral argument on request made after the call and during that day, in exceptional cases, such as unavoidable delay of counsel in reaching the Capitol, the argument to be so placed as to cause the least disruption of the docket and the least inconvenience to the lawyers engaged in other cases, and usually at the heel of the docket for that day.

2. *Time Allowed*: Cases are called in the order shown on the docket which the Clerk has previously mailed to all attorneys engaged in appeals set for the day specified. When the first attorney rises to argue the case, the presiding Justice will ask what time is desired for argument on each side. As much as thirty minutes to the side, making one hour for the case, will be allowed as a matter of course if counsel request that much time. However, attorneys frequently do not want that much time, in which case the time agreed upon by them will be allowed. But more than thirty minutes to the side may be granted by the Court where more time is needed to cover the case; in this event, however, the argument will be postponed to the heel of the docket for that day, so as not to detain attorneys in other cases while the longer arguments are being made. If more than one attorney argues for the same side, the time allowed for that side may be divided by the attorneys as they wish. However, since appellant has the opening and closing arguments, it is expected that the opening argument for appellant will present all of his contentions, so that counsel for appellee may reply thereto.

3. *Physical Mannerisms*: The style and manner of making arguments are for the individual attorney, and will be determined by the usual habits and manners which he has formed. Naturally lawyers can not change these habits overnight. However, it has been noticed that many lawyers do succeed in adopting a quieter and less demonstrative manner than when arguing to jurors. Of course, this manner is preferable before a supreme court. Logic, reason, conciseness and clearness of

statement are more helpful than physical gymnastics. However, it is certainly not recommended that a lawyer undertake to change life-long habits if thereby, during his argument, he is conscious of this effort to the extent of detracting from a thorough and lucid statement and analysis of the facts and issues of his case and the legal principles applicable thereto. An advocate, as with other speakers, is fortunate if he can "lose himself in his discussion."

4. *Objects*: Judge V. A. Griffith, in an address on this same subject,[1] stated the objects of a brief to be, first, that this court may be aided by the special learning of the lawyer and his study of that particular case; second, that the advocate may present the law and the facts as strongly and persuasively as he can while maintaining fidelity to the facts in the record and the law applicable thereto, and, third, to aid the judge to whom the case may be assigned for study to present the facts and the law to the other judges in conference. The first two objects apply with equal, and the third with little less, force to oral arguments. And, as to the latter, a further effect is better to enable the other judges to grasp the facts and legal principles and have them in mind when the case is presented in conference by the judge charged with the record.

5. *Introductory Statement*: At the very beginning, and as quickly as possible, counsel should get before the Court the questions involved on the appeal. Many lawyers make the mistake of proceeding at first to state their conception of the facts, even to detailing the testimony of the witnesses, when the judges do not know the nature and result of the proceedings in the lower court, and the errors it is contended were committed there, nor the question to be passed upon by this court. It should be borne in mind that this is a court of review. It passes only upon the correctness of the proceedings in the lower courts. These may be helpful illustrations of introductory statements:

(a) "Appellant Thompson was indicted for and convicted of the murder of one Stevens and sentenced to the state penitentiary for life. We urge on this appeal, first, that the evidence wholly fails, and is entirely insufficient, to prove him guilty of murder, or any other crime; second, that the court erroneously admitted in evidence a supposed confession of Thompson; third, that error was committed in admitting in evidence an alleged dying declaration of Stevens; fourth, that five of the jurors who served were drawn from bystanders instead of the regular jury box; and, fifth, that the district attorney, in his closing argument, made certain improper, inaccurate and inflammatory remarks to the jury. We, therefore, contend that the case should be reversed and appellant discharged, request for a peremptory instruction having been made

[1]See end of article for the reprint of the address by Judge Griffiths, infra p. 413.

in the lower court, but if he is not discharged, then that the case be remanded for another trial."

(b) "Jones sued Smith in the circuit court of Lafayette County for damages for personal injuries sustained by Jones in an automobile collision. Jones was driving one car and Charley Warren the other. Jones claims his injuries were caused by the negligent driving of Warren as the servant of Smith. Jones recovered a verdict and personal judgment for ten thousand dollars. Smith appeals. It is our contention on this appeal, first, that the negligence of Jones was the sole cause of his injuries; second, that Warren was not the agent of Smith; third, that instruction No. 2 granted to Jones was erroneous in that it assumed, and in effect told the jury, that Warren was negligent and was the servant of Smith at the time of the accident. Other errors are assigned and argued in the brief but we present now only those stated."

(c) "This is an appeal by Mrs. Celeste Evans from a decree of the chancery court of Hinds County dismissing, for lack of jurisdiction, her bill for divorce and alimony against Thomas J. Evans, the appellee. The only question presented on this appeal is whether the court had jurisdiction of the subject matter and the parties."

Upon hearing such introductory statement the judges are able to grasp immediately the proceedings and result in the lower court and the questions to be passed upon in this court. They are able to tie the arguments to these questions. Of course, more complicated cases may call for a more lengthy preliminary statement to get the setting and questions before the court. That depends on the case.

6. *Statement of Facts and Arguments*: After this the attorney can proceed with his discussion. The case may, or may not, call for a statement of the facts. Such statements may, or may not, be pertinent to the questions to be passed upon in this court. Case (a) above would call for such statement and arguments thereon; as also would case (b) insofar as the evidence bears upon Jones' negligence being the sole cause of his own injury; case (c) would require a statement of the facts pertaining to the residence of the parties, etc., and all facts bearing upon jurisdiction, but not on the merits of Mrs. Evans' claim for divorce and alimony. The issues in that case might be presented by the pleadings, in which case only the allegations in the pleading need be given. In other words, a lawyer should always state his case, but the extent of his statement of the evidentiary facts depends upon the issues to be decided. However, if any point at issue requires a statement of the facts, that point should be presented first and the facts be then disclosed to the court, so it will have the benefit of these facts in thinking upon the questions in issue.

Where it is necessary to state the facts, whether generally or as bearing especially on some particular point, counsel should be thoroughly familiar with the evidence and the facts and make as clear, concise, logical statement as he can. He can say, "These facts are not disputed," giving them; "these are in dispute but the evidence of appellant is much stronger than that of appellee"—briefly outlining it. He may need to state only the facts relating to some point, or if he has given a general statement, this may also cover the point. He should avoid repetition.

As he takes up each point, after stating the facts necessary to an understanding of that point, he should clearly state his legal propositions applicable thereto. He can then refer to the case, or cases, sustaining him, telling the court what they hold and the applicable rules of law announced therein. He should endeavor to present only cases in point. One or two cases in point are worth more than a multitude of non-point cases. He will have no time to ramble. No cases are to be read to the court. If a case contains a statement directly applicable to the legal proposition urged, it is permissable for counsel to read a short excerpt therefrom, preferably from his brief rather than from the book, and if the question is the construction of a statute the pertinent part of the statute should be read. It would cause great inconvenience and confusion in the courtroom to permit each attorney to bring thereto the books containing the cases he thinks support his contentions. This is not permitted.

Appellee, in reply to appellant, may or may not take issue on the facts. If he does take issue, he should state in what respects and urge his version of the evidence, and then proceed to reply to the contentions of appellant. Appellant's attorney will then have a reply to the argument of appellee, not to exceed the total time which appellant has been allowed.

In all arguments the questions should be separated and distinctly argued. Clear, concise, logical arguments are naturally much more helpful to the court than those that are rambling, confused and jumbled. That means an attorney should not undertake to make an oral argument unless he is thoroughly familiar with all the facts and questions involved in his case and the legal propositions applicable thereto. It is pertinent here to state that no attorney need fear that the court, when it considers the case in conference, will not have the pleadings, issues, facts and legal questions thoroughly in mind. Under the system in use cases are assigned by one of the secretaries. The assignment is by rotation as the cases appear on the docket. No judge has any choice. The judge to whom the record is so assigned reads it thoroughly, has in mind

all issues and facts and the respective contentions and authorities relied upon by each, and he gives this fully and fairly to all the other judges in conference, and there is a full and frank discussion of the issues and the law. The record is then assigned to another judge, who also makes a thorough study of the facts, issues and legal propositions involved and this judge makes another report of his conclusions and there is a further discussion. So that each record is studied by at least two judges and oftentimes by more than two of them.

7. *Questions*: (By the Court) It is pertinent to say, in this connection, that the court as now constituted is not a question-asking court. When questions are propounded to counsel during the arguments they are for the purpose of getting a point, or the contention of counsel thereto, or some doubtful fact, or legal proposition, more clearly before the judge asking the question. That does not mean, however, that some judge may not ask counsel a searching question which will disclose counsel's knowledge, or lack of knowledge, of his case and the law applicable thereto. No attorney need fear embarrassment by a question if he knows his case and has reasonable grounds for sustaining his contentions.

II. Briefs

1. *Time Within Which to File*: Rule 7 requires appellant's brief to be filed not later than thirty days, appellee's reply not later than ten days, and appellant's rejoinder not later than three days, prior to date the case is set for argument.

2. *Physical Form*:

(a) The members of this court necessarily do much reading. It is necessary to conserve eye energy as much as possible. Therefore, Rule 7 (3) requires briefs to be typewritten or printed, and, if typewritten, to be in black, non-copying ink, double-spaced, on white paper. That combination is considered best for reading.

(b) The best form for the brief, in my opinion, is that of a book, opening from right to left, with stiff backs. However, some attorneys use for backs the usual abstract, or legal document, covers carried in their offices, and these, even though flexible, are very good for the purpose. But the pasteboard backs are better. They do not have to be bound by a printer, although it would appear that the cost of such edge binding would be very small. The binding can be done in the lawyer's office by use of brads of suitable length, inserted through and bent back, or better, by the use of a Bates, or other like, fastener. The book-form brief lies flat and fits back of the record and it is more con-

venient for use by the judge who is handling it. Most of the briefs are fastened at the top and rolled up or folded, frequently making a bulky, hard-to-handle bundle, and the sheets are always curled out of natural shape. The rules do not prescribe the size paper so that in the book form either the regular large letter, or legal size paper may be used. If the brief is short, the large letter size is better; if long, the large legal size is preferable, because, of course, the larger the paper, the fewer sheets are required. If the brief is printed, it will naturally be in book form and even smaller than regular letter size paper, but it is hoped that the book-form will be more and more adopted where the brief is typewritten.

3. *Arrangement*: The first, or opening page, of the brief should contain the style and number of the case, on whose behalf it is filed, and the name and address of the attorneys, in such form as this:

"IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

John Doe ..... Appellant
v. No. 38,323
Richard Roe ..... Appellee

BRIEF OF APPELLANT

By Blackston & Marshall, Attorneys,
Meridian, Mississippi."

The next page, or pages, if needed, should contain a topical or general subject index of the contents of the brief, the pages covered by each subject, including the points urged in the brief, with a concise statement of the contention under that point and the legal proposition invoked in behalf of the contention, and each legal proposition should be immediately followed by a list of the authorities, with the book and page where found, supporting the announced legal rule. Such outline should contain, in the right margin thereof, each page of the brief where each cited authority is mentioned or discussed. For instance, in the Jones-Smith case above, a sample of this page might be:

"GENERAL INDEX TO BRIEF

I.

INTRODUCTORY STATEMENT 1

II.

OUTLINE OF PLEADINGS 2-3

III.

STATEMENT OF FACTS 4-7

IV.

ARGUMENT AND AUTHORITIES 8-30

POINT 1. The proof of this record shows conclusively Jones' injuries resulted solely and alone from his own negligence. In such case there can be no liability upon Smith for such injuries.

Thompson v. Cassedy, 181 Miss. 619, 179 So. 551 10-13-17

(Listing all other authorities under this point)

POINT 2. The evidence shows, without dispute, that Warren was not the servant of Smith and was not at the time of the accident engaged about the business of Smith, but, on the contrary, was on a private mission of his own.

(Listing authorities)

Such an outline enables the judges to find quickly the pages of the brief where the different subjects and points are discussed as they need to refer thereto in considering the case.

Some lawyers, in addition to this outline, list upon a separate page, in alphabetical order, all of the cases cited in the brief and each page of the brief where the case is mentioned. For illustration:

Beard et al. v. Williams,
172 Miss. 880, 161 So. 750 — 11-13-17
Great Atlantic & Pac. Tea Co. v. Davis,
177 Miss. 562, 171 So. 550 — 13-23-26

(And so on)

This practice is commended. It is of much aid to the court. The judges frequently need to refer again and again to some case or cases. This enables them to run quickly down the list and find the book and page of that case rather than wade through the brief and find it somewhere in the body thereof.

It is not amiss here to caution attorneys to be sure to give the correct book and page where the cited case can be found. The judges are pressed for time. It is annoying to find that a citation is wrong, necessitating that the judge himself try to run it down and find the report.

(a) *Introduction*: What is said above as to oral arguments also applies to briefs. See also suggestions by Judge Griffith hereto appended at end of article.[2]

(b) *The Pleadings*: If no point is made on the pleadings there is no need to set them out, unless by so doing a clearer understanding of the issue can be had. For illustration, cases (a) and (b) above would not require any detailed statement of the pleadings; case (c) would so far as they pertain to jurisdiction of the parties and the subject matter.

(c) *Statement of the Facts*: Much of what has been said as to oral arguments applies here and will not be repeated. See also Judge Griffith's observations under this head.[3] It might be noted that some attorneys, as a part of the statement of facts, take up the testimony of each witness, giving a summary thereof, and follow this method through the entire case. This may be of aid to some of the judges and I do not condemn it, but, so far as I am concerned, it is of little help. In the first place this method doubles or trebles the length of the brief, and most briefs are much too long; and in the second place, a recital of what the witnesses have said is a "twice-told tale" and is not nearly so interesting as the reading of what they say themselves and their manner of saying it. However, it does have the merit of enabling a judge to glance over the summary of the evidence of each witness, thereby refreshing his memory after he has read the testimony itself. For this purpose, where this method is adopted, the topical index should give the names of the witnesses and pages of the brief where the testimony is summarized, to aid the judges in finding it. Of course, lawyers should summarize the testimony, and even briefly quote it, where pertinent to and bearing directly upon the question under discussion.

I wish here to impress upon lawyers the importance of showing in their briefs the page of the record which supports the statement of the facts as made by them, including references to testimony, pleadings, exhibits, judgments, orders—wherever a statement is made in the brief which is based upon the record.

(d) *Argument*: Next comes the argument. The points should be taken up as outlined, or such of them as counsel may desire to argue, stating briefly the point and the facts pertinent to it unless the facts have already been stated. The case should determine the method. Rather than give a blanket summary of all the evidence, it will have more life and point if the parts pertinent to a certain point are set out and analyzed when discussing the point. For instance, in the Jones-Smith case, in trying to establish the fact that Jones' negligence was

[2]See infra p. 413.

[3]Infra p. 413.

the sole proximate cause of his own injury, counsel will need to outline the testimony of the witnesses bearing upon the negligence of both parties, describing their opportunity of observance, their nearness to the accident, whether they were passing the scene in other vehicles or standing by, whether the time was day or night, the condition of the weather, and other factors. In this connection, inquiry has been made whether lawyers should quote in their briefs the testimony of witnesses. This practice is commendable where the testimony is especially pertinent to and bears directly upon the question under consideration, or is given by a key witness, upon whose testimony that particular fact must depend, and where it is not quoted at too great length.

Counsel will then proceed to a discussion of his authorities, especially those most similar in fact and legal principles to the case at bar. It is helpful to develop briefly just how the legal proposition invoked arose in the cited case. And it might be stated that it is good practice to quote from the decided cases where such quotation is short and especially applicable to the point. This is helpful to the judge who is presenting the case. But judgment should be exercised in this respect. The brief should not be unduly lengthened and the quotations should be confined to those which go to the heart of the point under discussion.

The points should be separated and headed through the body of the brief, as they are discussed in the order that they appear in the general outline. We have had briefs from sixty to a hundred pages, or more, which contained no headings or separation of subjects—just running from one idea to another, frequently mixing them and often reverting again. The questions are separated presently in conference, which means, in that kind of brief, that the judge presenting the case must dig through the brief and himself try to separate the points and assemble under each the reasons, arguments, legal principles and authorities supporting the contention.

Lawyers should diligently endeavor to shorten their briefs. Most of them are much too long. The judges have discussed the necessity and advisability of adopting a rule limiting the number of pages briefs may contain. That has not been done yet and it is hoped that necessity will not require it.[4]

Each attorney should, of course, have a copy of, and be familiar with, the rules governing the practice in this court which have been, or may hereafter be, prescribed. The suggestions contained herein are to be considered in connection with those rules.

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[4]Editor's note. Since the revision of this article the Court has revised Rule 7 (3) to provide that briefs shall not exceed fifty pages.

Finally, it might be observed that a logical, lucid, learned argument, oral or written, in this court, is perhaps the best evidence of the greatness of a lawyer as an advocate and of his ability to serve his client and aid this court in the discharge of its important and sacred duties.

APPENDIX

Suggestions For The Preparation of Briefs[5]

There are three objects in the proper preparation and arrangement of a brief, assuming that the lawyer knows his case and the law applicable thereto, so far as the merits of the case are concerned. The main object is that the appellate court may be aided by the special learning of the lawyer in the case, which he is presumed to have derived from a study of that particular case for some time, accentuated by the interest he has in rendering his best service to his client. The second object is, of course, that he may in the interest of his client present the law and the facts as strongly and as persuasively as may be, while at the same time maintaining a true fidelity to the facts of and within the record, and the law applicable thereto. The third requisite, and one which is often overlooked, is that the brief may be so prepared and arranged that the judge or judges who read the record and the briefs, before the conference upon the case, may be able, by the aid of the briefs, to put the case before the associate judges in conference in such a way that no point touching a material fact or issue will be overlooked and no case in point will fail to be called to the attention of the associate judges.

This latter is hard to do with some of the briefs which are filed. The material points are not separately analyzed; the authorities are scattered throughout the brief without any attempt to gather them in such a way that the judge or judges who are putting the case to their associates may reach them readily; the facts and the law are often intermingled in such a fashion that it is difficult to tell precisely what is being urged, and whether of law or of fact. Instead of carrying its own analysis, as a brief ought to do, the judges or some of them must sometimes take the brief and by marginal notes on it, or by notations separately made by the judge or judges, try to point out and indicate what the points are, and, by these marginal or separate notes, to get it in such shape that it can be put in conference, point by point. But a brief so constructed as to require this to be done entails such a large amount of additional labor on the part of one or more of the judges

[5]This is a reprint of an address made by Judge V. A. Griffith, Associate Justice of the Supreme Court of Mississippi, on August 1, 1939.

that sometimes it must inevitably be true that neither they nor their associates will get the full or precise import of what is being urged upon the court.

For these reasons, a brief should be arranged in approximately the following manner:

On the first or opening page of the brief there should be written the style of the case, its docket number and the statement in whose behalf the brief is filed, and this is to be immediately followed by a topical or subject index.

Topical or Subject Index

This index is a concisely stated summary of each of the law points which the brief maker will urge before the court. Point I will be a concise statement, in one paragraph, if possible, of what that point is, and immediately following thereunder will be a list of every case or the citation of every text or statute which the brief maker is relying on in support of that point. Point II briefly stated will follow, and all the cases, texts or statutes which will be relied on in support of that point will be indexed thereunder, and so on through all the points. The index under each point will show the style of the case, the book and page where reported, and the page or pages in the brief where that case will be subsequently mentioned; and the same as to texts and statutes.

In referring to Mississippi cases, the official reports must be cited, since these are the reports which the Court regularly uses and must cite in the opinions. Unless the brief uses the official reporter citations, one of the judges will be obliged to make the translation, and this is a clerical work which the brief maker has no right to call on the judges to do.

Introductory

Beginning at the top of the next page following the close of the index, the style and docket number, and in whose behalf the brief is filed, may again be stated, and this is followed by a brief introductory giving the nature of the case, as for instance: "This is an action of ejectment, wherein the principal point in controversy is the question of adverse possession," or "This is a suit to set aside an alleged fraudulent conveyance, and among others the defense was that the grantor was not indebted to the complainant." This is not to be a statement of the case, for that feature comes later, but is only to give the court a quick glance at what the case is about, and, save in rare cases, ought not to be in more than one or two short paragraphs.

The Pleadings

The introduction is followed by a concise outline of the pleadings, if any point is to be made in regard to the state of the pleadings. More often than otherwise no point arises out of the pleadings, in which case the pleadings feature may and ought to contain only a brief reference to the pleadings, with the statement that there is no controversy under this head. At this point there should be stated the gist of what was done with the case in the trial court.

Statement of The Facts

Next following the pleadings feature is the succinct statement of the facts of the case, so far as essential or proper to a correct understanding of the questions presented for determination. This is not to be done by any extended question and answer quotation from the testimony, but by a clear, concise and accurate narrative of the outstanding pertinent facts, giving only such details as illustrate or disclose the precise import of the leading facts; and always there should be inserted the page or pages of the record which support or bear out each item of the assertion of the facts. Sometimes questions and answers may be quoted from the record, but this should be done only when the particular questions and answers go at once to the heart of the case, or of the particular point, and are not lengthy.

While the statement of facts should not extend to a greater length than necessary to put every really important and pertinent fact before the court, yet above all else, the statement of the facts should be accurate, and inaccuracy may occur in omitting a fact or facts which are of importance. Length is not to be avoided at the expense of accuracy; and whatever the length, the statement must be true to the facts, for if the court finds that the statement of the facts is distorted or misleading when checked and compared with the record, it may cause a serious loss of confidence in the brief as a whole. The statement should pursue an orderly and logical plan, and when this is done length is not in itself objectionable if the mingling of material and immaterial facts, and verbosity or discursiveness, are avoided.

The Argument

The statement of the facts is then followed by the full argument, point by point, according to the points as shown in the topical index. The authorities cited in the index are here taken up, and their application to the facts is shown; and it is of valuable aid, in most cases, to quote pertinent excerpts from the opinions in the cited cases and from the text books,—provided the quotations are not too lengthy; and pro-

vided, of course, the quotations are not misleading when taken apart from the remainder of the opinion or text. Frequently, in order to make the quoted words or holding of the court intelligible it will be helpful to state the facts of the cited case. This statement should be concise and clear, setting forth accurately only such facts as bear on the proposition of law for which the case is cited. This course is of particular service for the work in conference, when the quotations from the cases and texts may be read to all the judges in the convenient form furnished by the briefs, and where, when a case thus cited seems particularly in point, the book itself may be taken down and read by or in the hearing of the associate judges.

Sometimes the facts of a case will permit that instead of stating all the facts before entering upon the argument, the several points of law may be taken up in the order shown in the topical index, and the facts as applicable to each point may be stated thereunder and the argument on the law addressed thereto, and thence in the same order through all the points, thereby separating the statement of the facts according to the several law points. When this can be done, without detriment to the continuity of the argument, and without repetition, it is often more helpful to follow this course, particularly when some one point might be decisive of the whole case.

Next following the main argument, there may be the argument in answer to the contention of the other side as made in the trial court; or if the brief is for the appellee or is a reply brief by appellant, an argument in response to that contained in the previous briefs. Whenever, in any reply brief, supplementary points of law are relied upon, these should be carried back into the topical index together with the subjoined index of the authorities in support thereof in the same manner as in regard to the original points of law.

Conclusion

Such additional features than those above-mentioned may be incorporated according as counsel may deem advantageous, and there is the concluding summary in such terms as the brief maker may consider appropriate and helpful.

It is sometimes supposed that the appellate judges, or some of them, object to long briefs. This depends on the character of the brief and whether it bears evidence that the brief maker has thoroughly studied his case both on the law and the facts,—whether in what he says he is actually aiding the court instead of putting useless labor on the judges. If the case is important in the principles involved or is close upon the law the brief will be read more than once, and if not

burdensomely constructed will often be sent around to all judges in turn so that they may read it in advance of conference and sometimes after conference, and the judge who writes the opinion will want everything in it right before his eyes in that final state of its consideration. Thus the brief and argument should not only be convenient, but inviting to its repeated consideration and study. A brief too long, what ever else may be said about it, is not inviting. But long briefs are necessary in some cases, and at last, counsel must have the privilege to determine for himself how lengthy his brief shall be.

The above suggestions follow closely upon the outline set forth in Rule 27 of the Rules of the Supreme Court of the United States, and are founded upon the same reasons, as learned through the lessons of long experience in the work of appellate review. But what has been said herein are suggestions only; the Supreme Court of Mississippi has never adopted any mandatory rule, and does not expect to do so at any early date. Paragraph 2 of our Rule 7 is advisory and not obligatory. Counsel are at liberty, therefore, to adopt only such parts of the above suggestions as they may desire, but it is hoped that, at least, the feature of the topical and case index will soon come into general use.

The article by Judge W. D. Anderson in the *Mississippi Law Journal* for February, 1930,[6] when available to counsel, may be read in connection with and as a part of this article. Unfortunately, however, that article is now in the hands of only a few of the Bar.

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[6]Anderson, "The Brief on Appeal" (1930) 2 Miss. L. J. 263.

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